Attachment 4

From: Browne, Maria
Sent: Tuesday, June 23, 2015 2:23 PM
To: 'elangley@balch.com'
Subject: DEI Comcast

Eric,

Duke Energy Indiana (DEI) continues to refuse to process Comcast pole attachment permit applications, stating that "Comcast is currently suspended from new attachments." Comcast hereby requests that Duke begin processing attachment applications immediately. ***Please confirm by 5:00 p.m. Thursday, June 25, 2015 that the suspension by DEI has been lifted*.**

The basis for denial appears to be Comcast's refusal to pay disputed charges for the construction work undertaken by DEI, which charges are the subject of the parties' current legal dispute. As you know, federal law limits the reasons that DEI may deny access to its poles. An attacher's refusal to pay disputed charges is not a permissible basis for denying access. *See, e.g. Kansas City Cable Partners Kansas d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co*., Consolidated Order, 14 FCC Rcd 11599 (Cable Serv. Bur. 1999) at ¶ 18, attached. In light of this controlling authority, Comcast is puzzled by DEI's extant suspension as it appears to serve no proper purpose other than to harass Comcast.

I am also attaching prior correspondence sent by Comcast on this subject. Thank you for your prompt attention to this matter.

Regards,

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May 30, 2014

BY EMAIL AND FIRST CLASS MAIL

Eric B. Langley
Balch & Bingham LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4642

Re: Duke Energy Indiana Unlawful Denial of Access

Dear Eric:

I am on writing on behalf of Comcast Cablevision of Indianapolis, Inc. ("Comcast") concerning what increasingly appears to be an unlawful denial of access by Duke Energy of Indiana ("DEI") to poles it owns or controls, in violation of Section 224 of the Communications Act, and related Federal Communications Commission ("FCC") rules. I understand that DEI is refusing to process Comcast's pole attachment applications unless, and until, Comcast pays unrelated charges for compliance work, the responsibility for which is currently the subject of dispute between the parties. For your ease of reference, I attach two letters from me to you concerning the disputed charges, dated March 28, 2014, and October 21, 2013. *See* Attachments.

As you know, DEI's refusal to process Comcast's application for permits because of Comcast's refusal to pay unrelated disputed charges constitutes an unlawful denial of access in violation of governing FCC rules and policies.[1] Accordingly, DEI should commence processing Comcast's permits immediately.

In the meantime, to show its good faith and willingness to negotiate a resolution, I am also writing to notify you that Comcast intends to pay an additional $171,016 toward the total amount invoiced by DEI for pole attachment make-ready work performed for KDL Windstream ("KDL"). This amount is in addition to $112,823 already paid by Comcast in connection with similar work performed by DEI for KDL and billed to Comcast. The additional payment is for work performed by DEI on 42 poles for which Comcast accepted responsibility at the time of the parties' joint ride-out. However, whereas DEI is seeking approximately $336,000 for its work performed on the 42 poles in question, Comcast disputes the reasonableness of those charges, primarily because Comcast was never afforded an opportunity to review and approve the charges, as required by the parties' Agreement and federal law. Had DEI provided make-ready

[1] *See Kansas City Cable Partners Kansas d/b/a Time Warner Cable of Kansas City v. Kansas City Power and Light,* 14 FCC Rcd 11599 (Cable Serv. Bur. 1999) at ¶18 ("Debt collection is not permissible grounds for denial of access.").

costs estimates to Comcast in advance, Comcast would have opted to move its facilities underground rather than pay the full amount of charges invoiced by DEI. Comcast has calculated that moving its facilities underground instead would have cost $171,016. Accordingly, this latter amount more accurately reflects the appropriate expense of the work done on the 42 poles.

Payment of the additional $171,016 should not be construed as admission of any wrongdoing or as a concession that DEI was correct in proceeding with the make-ready work at Comcast's expense without providing sufficient notification to Comcast. Nor does it constitute a waiver of Comcast's rights, an establishment of any agreed course of dealing, or an accord and satisfaction.

Moreover, Comcast continues to dispute the assignment of unauthorized make-ready charges for the remaining work on the poles (charges totaling $573,778), as set forth in the attached letters. Accordingly, when added to the disputed difference in amounts charged and to be paid for work on the 42 poles, the total amount that remains in dispute between the parties now is approximately $738,762.

While Comcast is not making concessions, we are hopeful that this payment will be taken as evidence of Comcast's good faith intent to pay amounts for which it is willing to be held responsible. Moreover, although Comcast is not conceding its prior positions regarding the ongoing dispute, Comcast believes that further discussions would be beneficial to both parties and would provide the best avenue to resolving this matter. To that end, Comcast proposes that the parties meet in its 65th Street office on Tuesday, June 3, 2014.

Please feel free to contact me if you have any questions.

Sincerely,

Maria Browne

Maria Browne

Attachments

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Via E-Mail to: ELangley@Balch.com

March 28, 2014

Eric B. Langley
Balch & Bingham LLP
1901 Sixth Avenue North
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Re: Unlawful Duke Energy Indiana Make-Ready Demands in Kokomo, IN

Dear Eric:

I am writing on behalf of Comcast concerning what now appears to be a pattern of unreasonable and unlawful attempts on the part of Duke Energy Indiana ("DEI") to shift costs associated with correction of DEI's unsafe pole conditions onto Comcast. As you know, Comcast has disputed DEI's efforts to charge Comcast to replace DEI poles and rearrange DEI facilities in connection with the make-ready work being performed for KDL Windstream, Inc. Most recently, DEI has demanded that Comcast pay to correct National Electrical Safety Code (NESC) violations caused by DEI's and AT&T's prior installation of risers in response to Comcast attachment applications and courtesy overlashing notices.[1]

The facts are straightforward. Comcast has long been attached to the poles in question, and those attachments were made in compliance with the NESC pursuant to the permitting process outlined in the parties' pole attachment agreement. Other facilities were later attached to the poles by or on behalf of third parties (*e.g.*, riser installed by AT&T U-verse) or for DEI itself (*e.g.*, risers and street lights). Comcast was not consulted about, or made aware of, these subsequent attachments, which created NESC violations. DEI therefore violated 47 C.F.R. § 1.1403(c)(3), which requires DEI to provide Comcast "no less than 60 days written notice prior to … any modification of facilities other than routine maintenance or modification in response to emergencies."

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[1] While it has been Comcast's practice in the past to give DEI prior courtesy notice of overlashing, the FCC has long held that third party attachers such as Comcast are not required to obtain approval from pole owners for overlashing. *See, e.g., Amendment of Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 at ¶ 75 (FCC 2001) (third party attachers do not need to "obtain additional approval from or consent of the utility for overlashing other than the approval from the host attachment."); *Cable Television Ass'n of Ga. v. Georgia Power Co.*, Order, 18 FCC Rcd 16333 at ¶ 13 (E.B. 2003).

DEI has admitted in e-mail correspondence with Comcast that the subsequent attachments made by DEI or with DEI's approval caused the NESC violations. On March 21 Comcast employee Jerry Shutters wrote to DEI employee Larry Castetter:

> So no matter if we were there and your field Tech installed these riser [cables] or wiring for a dusk to dawn lighting [system] and not given us the 40" clearance from us. And then not sent a JUR requesting for us to lower if we could. Are you saying that Comcast is the one that did the violation and needs to pay [to correct] it[?][2]

Later that day, Mr. Castetter responded by e-mail:

> Yes, Jerry that is correct. We should have sent a JUR at the time of installation and asked at that time if you would like to stay on Duke's poles or remove your attachments. If you choose to stay on the poles, then at that time we would have charge for the required make ready.[3]

For multiple reasons, DEI's attempt to shift costs associated with its and others' pole modifications is patently unlawful. First, such cost shifting is prohibited by the FCC's make-ready cost rule codified at 47 C.F.R. § 1.1416(b), which states that "a party with a preexisting attachment to pole ... shall not be required to bear any costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment ... sought by another party." When adopting this rule in its 1996 *Local Competition Order*,[4] the Commission held:

> A utility or other party that uses a modification as an opportunity to bring its facilities into compliance will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.[5]

Indeed, the FCC repeatedly has held that pole owners may not require third-party attachers such as Comcast to pay for pre-existing violations.[6] And, pole owner reservations of space may only be pursuant to bona fide plans for core utility service needs.[7]

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2 *See* Attachment 1.

3 *Id.*

4 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (FCC 1996).

5 *Id.* at ¶ 1212.

6 *See, e.g., Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615 at ¶ 37 (FCC 2003) ("it is an unjust and unreasonable term and condition of attachment in violation of [47 U.S.C. § 224], for a utility pole owner to hold an attacher responsible for costs arising from the correction of another attacher' safety violations."); *Kansas City Cable Partners v. Kansas City Power and Light Co.*, Consolidated Order,14 FCC Rcd. 11599 at ¶ 19 (Cable Services Bureau 1999) ("Correction of pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.").

In addition, the Indiana Utility Regulatory Commission ("IURC") has codified Part II of NESC (2002 Ed.) as part of the Indiana Administrative Code.[8] NESC Rule 214(A)(1) requires periodic inspections of lines and inspections and NESC Rule 214(A)(5) mandates the ***prompt*** repair, disconnection or isolation of all "defects that could reasonably be expected to endanger life or property." Because compliance with the NESC is mandatory under Indiana law, DEI may not ignore the law and delay the correction of NESC violations until it can impose the costs of those corrections on another party – in this case, Comcast.

Comcast has requested a meeting with DEI representatives to resolve the make-ready charge dispute associated with KDL Windstream. Most recently, we proposed a meeting for March 10 at Comcast's offices, but did not receive a response. Please let me know if your clients are available to meet sometime during the next two weeks to discuss these increasingly troubling issues.

Sincerely,

Maria Browne

Maria T. Browne
Davis Wright Tremaine LLP

Counsel for Comcast

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[7] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd 18049, ¶ 70 (1999).

[8] *See* 170 IAC § 4-1-26.

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Maria T. Browne
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October 21, 2013

Via E-Mail and U.S. Mail

Eric B. Langley
Balch & Bingham LLP
1710 Six Avenue North
Birmingham, Alabama 35203-2014

Re: Duke Energy Indiana

Dear Eric:

I am writing on behalf of Comcast Cablevision of Indianapolis, Inc. ("Comcast") as a follow up to our telephone conference on October 3, 2013, in which we discussed the ongoing dispute between Comcast and Duke Energy of Indiana ("DEI") related to invoices presented to Comcast by DEI in connection with make-ready work performed for KDL Windstream ("KDL"). To date the invoices total approximately $1 million ("Invoices") (a list of the Invoices and amounts is included as Attachment A).

As we discussed, DEI presented the Invoices to Comcast in connection with work that DEI asserts was performed to correct non-compliant conditions on poles surveyed in connection with KDL's deployment of facilities in West Lafayette, Indiana. Comcast has not yet paid the Invoices. Moreover, Comcast has repeatedly expressed its concerns about the lack of lead time to consider work arounds, the lack of estimates, the amount of the Invoice charges, the necessity of and responsibility for the work performed, and DEI's completion of work without having obtained advance mutual agreement from Comcast concerning the work to be performed or the charges for such work.

As discussed on the call, Comcast representatives have communicated disagreement about the assignment of responsibility to Comcast for violations during the pre-construction joint surveys. (Attachment B includes Comcast's notes taken at the time of the rideout for approximately 25% of the invoiced poles; similar notes on the remaining poles will be provided no later than next week.) In addition to concerns expressed on the ride-outs and in April emails, Comcast representatives met with DEI representatives in July to discuss the Invoices. At that meeting, Comcast expressed the following concerns:

- Comcast was being charged to correct NESC violations which, based upon the physical evidence at the pole, were not caused by Comcast. DEI's response was that Comcast would be deemed responsible unless it could produce the original 1410 or JUR.

- DEI was not affording Comcast an opportunity to contest responsibility for the alleged NESC violations, or to assess the cost of DEI's proposed correction and consider less costly alternatives (such as re-routing Comcast facilities or going underground). In fact, in some cases, Comcast already had begun the process of moving its facilities underground when DEI subsequently replaced the pole (the cost for which it invoiced Comcast). DEI's inspector stated that if DEI had not heard from Comcast within one week, DEI went forward with the pole replacements. The DEI inspector also mentioned a 30 day timeframe. When Comcast representatives asked whether either timeframe was available in writing, he responded that they were not but would be soon. (If fact, as discussed below, the parties' Master License Agreement dated April 26, 1990 ("Agreement") contemplates a 30 day notice period).

- DEI appeared to be charging Comcast to replace poles where DEI was adding transformers and/or upgrading DEI facilities but not paying its proportionate share of the replacement. DEI's response was that it was not charging for the cost of the transformer or electrical line upgrade.

- DEI's pole replacement charges did not account for depreciation.

Comcast followed up with a letter from outside counsel dated August 2, 2013. In that letter Comcast counsel explained that Duke could not simply charge Comcast for work without providing Comcast a meaningful opportunity to evaluate the charges related to that work in advance of such work being performed or without sufficient detail for Comcast to assess the charges and consider less costly alternatives.

Ms. Karol Mack responded to Comcast in a letter dated August 23, 2013. From that letter and the October 3, 2013 call, it appears that there is disagreement between the parties concerning:

- Whether, contrary to Section 4 of the Agreement, the multi-party pre-construction survey ride-out (performed in connection with KDL's pole attachment applications) is the proper time or place to make final decisions concerning the existence of and entity responsible for pre-existing non-compliance.

- Whether Comcast indicated during the pre-construction survey ride-outs resulting in the invoiced work that it did not agree with the overwhelming majority of instances in which DEI attributed non-compliance responsibility to Comcast.

- The appropriate NESC edition that should be used in assessing compliance for purposes of assigning responsibility for non-compliance. NESC Rule 013B3 sets forth the "grandfathering" clause. "Where conductors or equipment are added, altered, or replaced on an existing structure, the structure or the facilities on the structure need not be modified or replaced if the resulting installation will be in compliance with either (1) the rules which are in effect at the time of the original installation, or (2) the rules in effect in a subsequent edition to which the installation has been previously brought into

compliance, or (3) the rules of this edition in accordance with Rule 13B1." Section 4(h) of the parties' Agreement includes a grandfathering clause as well.

- Whether Comcast is being afforded sufficient time and pricing detail to constitute a just and reasonable opportunity to assess the costs associated with the proposed work and to consider less costly alternatives. Sections 4(c) and 5(c) of the parties' Agreement provide that Comcast shall be afforded a minimum of 30 days prior written notice before having to vacate space, authorize a pole replacement or make changes required by DEI.

- Whether Frontier should have been held responsible for sharing in certain costs related to pole replacement.

- Whether DEI lawfully proceeded with the work without written approval by Comcast. Section 4 of the parties' Agreement requires "due notice" and "prior mutual agreement" for work performed by DEI at Comcast's expense.

- Whether DEI's charges for the work were reasonable. Indeed, the parties' Agreement provides that Comcast "shall not be liable for the cost of that portion of any pole or facilities which is in excess of the minimum which is required as a result of [Comcast's] requirements or facilities, unless such portion of such pole or facility is the direct result of Licensor's purchasing or engineering standards in order to meet licensee's requirements." Moreover, based upon Comcast's review, it could have placed its facilities underground or re-routed it facilities for one-third the amount of the charges set forth on the Invoices.

Unless and until these issues are resolved, Comcast can agree to pay only the costs associated with raising or lowering of Comcast facilities, or approximately $80,000, but cannot agree to pay the disputed amounts in the outstanding Invoices. As explained above, the disputed portions of the Invoices are unsubstantiated, inconsistent, or excessive when compared to typical make-ready costs, even for a project of this magnitude.

In addition, going forward, Comcast must have a meaningful opportunity to: (1) agree to or contest responsibility for pre-existing violations; and (2) choose whether to maintain an attachment on DEI poles (and pay proposed charges for remedying any non-compliance) or remove its attachment and pursue less costly alternatives. Such opportunity must include a minimum of thirty (30) days advance written notice as well as clear and understandable supporting documentation that enables Comcast to assess the cost of the proposed compliance work and consider alternatives. The pre-construction survey joint ride out is not the place nor time to make final decisions concerning (1) the entity that caused the violation; (2) the appropriate solution for remedying the violation; or (3) the cost to correct the violation. These decisions should be made after the parties have had an opportunity to review records and consider alternatives, should be agreed upon, and communicated in writing with a reasonable time for response. This is consistent with NESC Rule 214A4 and 5, which provides that corrections that are not expected to endanger life or property need not be corrected immediately but may instead be "designated for correction." Finally, Comcast must be afforded a reasonable opportunity to demonstrate that its attachment meets the NESC standards in effect at the time of

its attachment or current standards, and/or that it did not cause a particular pole violation. Simply presuming that Comcast caused a violation if it cannot produce a paper permit for attachments that are more than 30 years old is not a reasonable or legally defensible solution.

At the conclusion of our call, Comcast and DEI agreed to research the facts underlying the Invoices to determine whether any of the disputed issues could be revolved. Specifically, both parties agreed to review their notes for the pre-construction survey ride-outs to discuss whether or not agreement was reached as to the scope of work needed to be performed to ensure NESC compliance and the entity responsible for such work. We agreed to put Comcast's concerns in writing (and have done so here) and the parties agreed to get back in touch once this had occurred. Please let me know when Comcast should expect to hear back from Duke concerning its factual research.

Kind regards,

Maria Browne

Attachments

ATTACHMENT A

Invoice No.	Invoice Amount
PO385166402	$ 20,229.00
PO400095102	$ 1,777.00
PO399668702	$ 1499.00
PO390914002	$ 70,307.00
PO386170306	$ 14,975.00
PO377471202	$ 36,942.00
PO396988702	$ 49,539.00
PO358360202	$ 186,705.00
PO390913002	$ 151,517.00
PO361184602	$ 33,650.00
PO394833202	$ 127,727.00
PO398161205	$ 180,107.00
PO398162502	$ 14,330.00
PO375201002	$ 88,599.00
Total:	$ 977,903.00